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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of)
)
Carriage of the Transmissions of)
Digital Television Broadcast Stations)
)
Amendments to Part 76 of the)
Commission's Rules)

CS Docket No. 98-120

To: The Commission

REPLY COMMENTS
OF
PAXSON COMMUNICATIONS CORPORATION

PAXSON COMMUNICATIONS CORPORATION
601 Clearwater Park Road
West Palm Beach, FL 33401
561/659-4122

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SUMMARY

Congress directed the Commission to initiate this proceeding to ensure mandatory carriage of local broadcasters' digital signals. The cable industry, however, wishes to obstruct the implementation of digital television and is refusing to carry all broadcasters' DTV signals until stations terminate their analog transmissions. The cable industry strains to reinterpret the words of Congress, **but the must carry statute does not distinguish between analog or digital signals.**

DTV must carry serves the public interest by protecting the viability of free, over-the-air television and preserving the multiplicity of media voices. DTV must carry also will provide the regulatory certainty necessary for broadcasters, manufacturers, consumers, and the cable industry to transition successfully to digital television.

DTV must carry furthers the same important government interests identified by the Supreme Court in *Turner*. **Digital technology does nothing to eliminate the ability of cable operators to exploit bottleneck control and discriminate against local broadcasters.** Cable operators can threaten the viability of local broadcast stations more easily than ever. The cable industry would have the Commission believe that digital technology is so peculiar, the mandatory carriage provisions would be transformed into an unconstitutional statute. Fortunately, in refusing to exclude digital signals from the must carry requirements, Congress recognized that technology may change but guiding principles do not.

The must carry rules do not constitute a taking. Courts long ago determined that mandatory carriage was a reasonable regulation of the type the cable industry should expect. The transport of electronic signals is not a physical taking and does not interfere with cable operators' investment-backed expectations. The must carry provisions serve the important public purpose of preserving the viability of free, over-the-air television while permitting the reasonable use of cable operators' systems.

Congress accounted for must carry's burden on cable operators in limiting the number of local signals to no more than one-third system capacity. The Supreme Court determined that the limit was an appropriate balance between the interests of the government and those of the cable operators. **The implementation of digital television does nothing to change the one-third limit.** To the extent cable operators have not exhausted their one-third capacity, they enjoy a programming windfall that will be regained at the close of the transition or through capacity upgrades. The Commission should move decisively to ensure the mandatory carriage of the digital signals of local broadcast stations.

TABLE OF CONTENTS

	<u>Page</u>
SUMMARY	i
I. DTV MUST CARRY SERVES THE PUBLIC INTEREST.	4
II. THE ACT REQUIRES MANDATORY CARRIAGE OF DIGITAL TELEVISION SIGNALS DURING THE DTV TRANSITION	8
III. DTV MANDATORY CARRIAGE FURTHERS THE SAME IMPORTANT GOVERNMENT INTERESTS IDENTIFIED IN <i>TURNER</i>	11
A. Digital Must Carry Protects the Viability of Free, Over-the-Air Broadcasting and the Multiplicity of Media Voices.	11
B. Digital Technology Does Not Eliminate the Ability of Cable Operators To Harm Local Television Stations.	15
IV. MUST CARRY RULES DO NOT CONSTITUTE A TAKING OF PROPERTY .	17
V. CONGRESS ACCOUNTED FOR THE BURDEN ON CABLE OPERATORS .	24
CONCLUSION	26

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Paxson Communications Corporation ("Paxson") hereby submits its Reply Comments in response to comments filed in the above-captioned proceeding.¹ In its initial comments, Paxson urged the Commission to carry out Congress's clear directive and move decisively in announcing that digital broadcast television signals already are entitled to mandatory carriage pursuant to Section 614 of the Communications Act of 1934, as amended (the "Act").² Paxson herein responds to those commenters who ask the Commission to deviate from the plain language of the Act. Paxson urges the Commission to preserve the viability of free, over-the-air broadcasting and the multiplicity of media voices that otherwise will be harmed by the cable industry's refusal to carry the DTV signals of all local broadcasters.

¹ *Notice of Proposed Rulemaking*, CS Docket No. 98-120, FCC 98-153 (released July 10, 1998) ("*Notice*"). In an *Order* released on November 18, 1998 (DA 98-2342) the Commission extended until December 22, 1998, the deadline for the filing of Reply Comments in this proceeding.

² 47 U.S.C. § 534 (1997).

Those in the cable industry argue generally that there should be no transition in the carriage of DTV signals; instead cable operators propose a digital “cliff effect” of their own: a toggle switch between the mandatory carriage of broadcasters’ analog and digital signals at the point television stations terminate their analog transmissions. The fact that the cable industry is advancing this proposal is very unsurprising given that the absence of any transition to DTV must carry would seriously threaten the viability of local broadcasters. By exploiting their bottleneck control, cable operators would deny viewers access to local broadcast digital signals until the completion of the DTV transition, thus dictating on their own the implementation of digital television. At the same time, cable systems likely would favor cable network programming by carrying those signals in HDTV-quality format — in contravention of Congress’s material degradation requirements. This all-too-familiar discriminatory treatment is precisely the harm Congress sought to prevent when it enacted the mandatory carriage provisions. Under the cable industry’s version of the digital cliff effect, cable operators would have less further to go than ever to jeopardize the economic viability of local broadcast stations saddled with DTV capital and operating costs. **Local broadcasters would go off the cliff to financial ruin. At the same time, the cable industry would favor cable network programming which they own.**

The cable industry apparently would have the Commission believe that DTV is some technological oddity that necessitates a wholesale abandonment of existing law, regulation, and policy. The cable industry argues that mandatory carriage of digital signals would not further the same important government interests advanced by the

carriage of analog signals and challenges the Commission to identify *any* interest DTV must carry would promote. Fortunately, Congress was less intimidated by the new technology and properly declined to distinguish between analog and digital signals in its must carry provisions, recognizing that while technologies change, guiding principles do not. And while television formats may change, the importance of the economic viability of local stations and of the multiplicity of free, over-the-air voices has not. The critical issue now is the diversity of multi-channel programming sources in the evolving video world. If cable networks, such as Discovery Communications, Inc. which is owned by the cable giants TCI, Cox and Comcast, can own and operate 11 channels of programming, then the Commission must ensure a level playing field for broadcasters by permitting them to have five channels of programming. And this programming must be carried on cable to be competitive with the cable-owned multi-channel networks.

Congress asked the agency to initiate this proceeding to establish rule changes necessary to ensure DTV cable carriage, not to debate the need for or the public interest served by cable carriage. Consistent with its desire to delay mandatory DTV signal carriage as long as possible, the cable industry argues that DTV is so peculiar and bizarre, a new, substantial record — in addition to the volumes already accumulated — documenting several years of economic failure of DTV stations would be required to justify the additional burdens DTV must carry would create. No such record is necessary. **The Commission must not be tempted by the cable industry's mystification of DTV technology. Technology simply enables change, but it does not create change. The Supreme Court already has determined that Congress's balance of must carry interests and burdens was constitutional.** The Commission,

so informed, is required to remain within those boundaries set by Congress and the Supreme Court to ensure that DTV mandatory carriage prevents the harms those bodies identified. As the Supreme Court said in *Turner II*, "Congress is under no obligation to wait until the entire harm occurs but may act to prevent it."³ That is exactly what Congress has done here, and the Commission is not authorized to deviate from that course.

I. DTV MUST CARRY SERVES THE PUBLIC INTEREST.

Congress and the Supreme Court have determined that the must carry requirements further the important government interests of preserving the benefits of free, over-the-air local broadcast television signals and promoting the widespread dissemination of information from a multiplicity of sources. **DTV must carry plainly advances those precise interests and is an essential element of diversity in a multi-channel programming world.** Absent DTV must carry, many debt-ridden local broadcast stations would not have their DTV signals delivered to the two-thirds of all households that subscribe to cable — until cable operators toggle switch broadcasters' must carry signals from analog to digital. This cable version of the digital "cliff effect" permits cable operators to divert viewers (and the advertising revenues that follow) to HDTV cable network programming, thus threatening the economic viability of local broadcasters and warranting the mandatory carriage rules.

The cable industry argues that DTV must carry is an irrational policy. Time Warner, Cablevision, and Microsoft contend that the Commission should refrain from

³ *Turner Broadcasting Systems, Inc. v. FCC*, 117 S.Ct. 1174, 1197 (1997) ("*Turner II*").

following Congress's must carry provisions and rely on the marketplace.⁴ The marketplace, they say, will ensure that DTV will be a success. Paxson is a believer in the free market and agrees that the marketplace should be the arbiter of success. However, as a competitor in the marketplace, Paxson finds it peculiar that holders of monopoly power would be championing in this instance the virtues of the free market. As the Supreme Court detailed in *Turner II*, the cable industry exploited monopoly power and corrupted the free market of video programming distribution,⁵ forcing Congress to enact the mandatory carriage provisions so that the marketplace *could* be free. The must carry rules limit the ability of those holding bottleneck power to erect artificial barriers and thus permit the marketplace to function properly. Paxson concurs that, when Congress permits, the Commission should rely upon the marketplace to protect the viability of local broadcasters. Here, Congress has already required that the Commission ensure digital must carry **by directing the Commission to "establish any changes in the signal carriage requirements...to ensure cable carriage of [advanced television] broadcast signals of local commercial television stations which have been changed to conform with [advanced television] standards."**

Digital television also is not a creature of the marketplace. ***The Commission, not the marketplace, is requiring broadcasters to construct their digital stations and place them in operation.*** Accordingly, it would be unreasonable for the

⁴ Comments of Time Warner at 6 ("Time Warner Comments"); Comments of Cablevision at 14 ("Cablevision Comments"); Comments of Microsoft at 13-17 ("Microsoft Comments").

⁵ *Turner II*, 117 S.Ct. at 1190-97.

Commission to mandate the implementation of digital television, plant the seeds for its service, and then get out of the way in the name of the “marketplace.” Indeed, cable operators quite clearly have stated in their comments that there will be no cable DTV transition for all local broadcasters but that, at the discretion of cable operators, stations will have to rely upon analog carriage until analog spectrum is returned. This is the “free marketplace” upon which the cable monopoly would have the Commission rely. To protect the viability of all local broadcast stations and the multiplicity of media voices, the Commission must ensure that the marketplace *is* free and restrain the discriminatory actions of those with bottleneck power in the manner Congress prescribed.

Time Warner contends that DTV must carry is poor policy because only the wealthy can afford digital receivers and thus only the wealthy will benefit.⁶ It is, apparently, the cable industry’s aspiration to thwart the transition to digital service and keep the cost of digital receivers high — that is, until broadcasters have returned their paired channel. Costs of digital receivers will come down, of course, but only when consumers have a reason to purchase them. The cable industry has stated its preference to delay the transition as long as possible, keeping receivers high priced and forestalling any return broadcasters might gain from DTV while saddling broadcasters with all of the costs. The “transition” cable would dictate is no transition at all. Prohibiting digital must carry guarantees that digital receiver cost curves will be flat and that expected price decreases will be delayed.

⁶ Time Warner Comments at 7.

Time Warner also contends that DTV must carry eliminates the incentive for cable operators to upgrade and expand capacity because one-third of their new capacity must be dedicated to local broadcast stations.⁷ If cable operators choose not to upgrade, it is not up to the Commission to protect them from irrational decisions. Suggesting that cable operators would be reluctant to upgrade because of the one-third cap is akin to suggesting rates will not increase because of the presence of taxes. While digital technology does not have the transformative power on congressional statutes as ascribed to it by some in the cable industry, it does provide a glidepath to increased capacity and capability. If some in the cable industry determine not to take advantage of this technological opportunity, it is no reason for the Commission to deviate from Congress's must carry directive.

The cable industry also argues that DTV must carry is bad policy because the DTV technology is too bizarre to understand as yet. NCTA maintains that there are too many unknowns to justify mandating digital must carry.⁸ TCI claims that so many technical challenges remain, must carry would retard and not advance DTV.⁹ Microsoft asserts that digital technology raises complex technical questions for which there is little guidance and that must carry could stifle progress and prolong the DTV transition.¹⁰ Paxson understands that there is no question that digital technology has not developed

⁷ *Id.* at 10.

⁸ Comments of the National Cable Television Association ("NCTA") at 39-40 ("NCTA Comments").

⁹ Comments of Tele-Communications, Inc. ("TCI") at 14-15 ("TCI Comments").

¹⁰ Microsoft Comments at 5.

sufficiently to answer all DTV transition issues. However, these problems ultimately will be resolved. Moreover, the technology is not so bizarre as the cable industry makes it out to be.

The Commission recognized in mandating the DTV construction schedule that the best policy for addressing technical challenges is to provide regulatory certainty in a confident fashion. Although some may be intimidated by digital technology, Congress was not and the Commission should not be. Congress clearly intended that DTV signals would be carried by cable operators and directed the FCC to ensure mandatory carriage. By ensuring digital must carry at this time, the Commission will advance, not stifle, DTV by providing certainty to consumers, broadcasters, manufacturers *and the cable industry*. **The technological unknowns presented by digital television are real but do not rise to a level that would justify abandoning a statutory mandate.**

II. THE ACT REQUIRES MANDATORY CARRIAGE OF DIGITAL TELEVISION SIGNALS DURING THE DTV TRANSITION.

In its initial comments, Paxson showed that Congress made no distinction between analog and digital in requiring cable operators to carry local broadcast signals, though Congress plainly could have excluded DTV signals from mandatory carriage just as it excluded ancillary and supplementary services. Rather, instead of excluding digital signals, **Congress stated that the Commission shall “establish any changes in the signal carriage requirements ... to ensure cable carriage of [advanced television] broadcast signals of local commercial television stations which have been**

changed to conform with [advanced television] standards.” Section 4 of the 1992 Cable Act.¹¹

The cable industry's contrary interpretation of Congress's plain intent is unsupportable. The crux of its argument is that the phrase “signals . . . which have been *changed*” should be reinterpreted to mean “signals . . . which have been *exchanged*,”¹² thus precluding the mandatory carriage of DTV signals until the end of the DTV transition period. Cable operators argue that to read Section 614(b)(4)(B) as requiring DTV must carry now would render the phrase “which have been changed” as superfluous, in contradiction to tenets of statutory construction.¹³

If Congress had intended such a mutually exclusive interpretation of the effect of this phrase on broadcasters’ cable rights, it would have added the two letter prefix and said “exchanged” just as NCTA posits — but Congress did not do so. Section 614(b)(4)(B) requires DTV must carry when broadcasters’ signals are changed — not exchanged. Irrefutably, broadcasters’ signals are *changed* at the moment their DTV transmissions commence. Were the Commission to apply the cable industry’s suggested interpretation of “change” to the *preceding* use of the term in the Section 614(b)(4)(B) (i.e., “establish any *changes* in signal carriage requirements”), the Commission would manufacture expansive authority to *exchange* Congress’s requirements for its own. Instead of an exchange of requirements, the term is plainly

¹¹ 47 U.S.C. § 534(b)(4)(B) (emphasis added).

¹² NCTA Comments at 10.

¹³ *Id.*

understood as requiring a transformation within some existing framework. This same plain meaning must be applied to the phrase at issue. Broadcasters' signals change upon commencement of their DTV operations. Accordingly, the phrase "which have been changed" is not surplusage but reasonably and plainly indicates *when* DTV must carry will be required.

The cable industry's interpretation of other provisions of the Act to support its position of "No Must Carry" is erroneous. NCTA and Time Warner argue for instance that Section 624(f)(1) of the Act¹⁴ prohibits DTV must carry because it is not "expressly provided in [Title VI];"¹⁵ yet Title VI's Section 614(a) expressly provides that cable operators shall carry "the signals of local commercial television stations." If Congress, plainly aware of DTV, wished to provide only for analog signal carriage, it expressly would have added the term "analog" to Section 614(a).

The cable industry erroneously believes that DTV mandatory carriage would require operators to provide subscribers with set-top boxes so that they could receive a DTV signal. Section 614(b)(7) of the Act requires must carry signals to be "provided to every subscriber" and that such signals be "viewable via cable on all television receivers of a subscriber."¹⁶ NCTA and Time Warner argue that, under Section 614(b)(7), digital must carry would lead to the absurd result of cable operators being required to provide each subscriber with DTV receiver capability, and therefore it could not have been

¹⁴ 47 U.S.C. § 544(f)(1).

¹⁵ NCTA Comments at 5; Time Warner Comments at 39.

¹⁶ 47 U.S.C. § 534(b)(7).

contemplated.¹⁷ The plain intent of Congress, however, as noted in the caption of Section 614(b)(7) (*i.e.*, “SIGNAL AVAILABILITY”), was to ensure that cable operators did not exploit their bottleneck control via technical means and circumvent mandatory carriage requirements by constructing their systems so that broadcasters’ signals were not available to subscribers. Cable carriage of both DTV and analog signals may occur and may be duplicative to some extent in light of the Congressionally-imposed simulcasting requirement. However, DTV signals for non-DTV receivers would have to be converted to a format substantially duplicative of NTSC to be viewable and the carriage of these duplicative signals would not be required. The “absurd” results deduced by the cable industry are as fanciful as their strained interpretation of this, and other, statutory language.

III. DTV MANDATORY CARRIAGE FURTHERS THE SAME IMPORTANT GOVERNMENT INTERESTS IDENTIFIED IN *TURNER*.

A. Digital Must Carry Protects the Viability of Free, Over-the-Air Broadcasting and the Multiplicity of Media Voices.

The must carry provisions satisfied intermediate scrutiny under *O’Brien* because they advanced the important government interests of preserving the benefits of free, over-the-air local broadcast television signals and promoting the widespread dissemination of information from a multiplicity of sources.¹⁸ Although Congress did not distinguish between analog and digital signals in requiring mandatory carriage, the cable

¹⁷ NCTA Comments at 15-16; Time Warner Comments at 47.

¹⁸ *Turner II*, 117 S. Ct. at 1199.

industry nonetheless argues that DTV must carry, in and of itself, would not further these government interests and thus would fail on constitutional grounds.¹⁹

The Supreme Court already has determined that the must carry provisions permissively advance these important government interests. That DTV must carry plainly advances those same interests is made obvious upon considering the “No Must Carry” proposal championed by the cable industry. Absent DTV must carry, many stations bearing the debt of DTV construction and operation costs would not have their DTV signals delivered to cable subscribers until such time that broadcasters terminate their analog transmissions and return the second channel. Yet to survive until that point, local broadcast stations would be forced to rely upon cable carriage of their analog signals to reach cable viewers while attempting to compete over-the-air with cable network HDTV programming carried on cable systems (and whichever digital signals of local broadcasters cable operators choose to carry). Cable operators will be more than happy to accept diverted advertising revenues for the higher-quality pictures of (and thus likely higher-rated) cable network programming while simultaneously undermining local broadcasters’ economic viability. Cable operators would be permitted to provide digital quality for the programming of its choice. **Congress found that such discriminatory use of bottleneck power threatened the economic viability of local broadcasters and that the must carry provisions thus were warranted.**

Contrary to Time Warner’s claims, no speculative “chain of predictions” is required to conclude that cable systems would not treat digital signals any differently

¹⁹ Cablevision Comments at 10; Comments of BET Holdings II, Inc. (“BET”) at 13-15 (“BET Comments”).

than they did analog signals.²⁰ Cable operators' past actions resulted in the creation of a voluminous record demonstrating their propensity to engage in an economically rational strategy of threatening the viability of local broadcasters.²¹ With such a concern heightened by the digital transition, DTV must carry would protect the benefits of free, over-the-air local broadcast television signals and promote the multiplicity of media voices in a direct and material way.

TCI and BET differentiate digital and analog must carry by asserting that local stations would not be in jeopardy because the mandatory carriage of analog signals is sufficient to protect the economic viability of local broadcasters.²² However, as described above, local broadcasters *will* be threatened if denied carriage of their digital signals until such time as analog transmissions are terminated. If cable operators limit mandatory carriage solely to analog signals, they have discretion to subordinate broadcasters of their choice with a twentieth-century format while viewers and advertisers flock to the twenty-first-century, digital programming of networks deemed worthy. TCI and BET also argue that DTV must carry would be contrary to the government's interest in the multiplicity of media voices by causing channel-locked cable operators to drop low-rated cable networks to make room for local broadcasters' DTV signals.²³ This contention is illogical. Congress already determined that no more

²⁰ Time Warner Comments at 21.

²¹ *Turner II*, 117 S.Ct. at 1190-97.

²² TCI Comments at 11; BET Comments at 14.

²³ TCI Comments at 19-21; BET Comments at 15-20.

than one-third of a cable system's capacity must be dedicated to local broadcasters' signals. This one-third cap is not eliminated by DTV mandatory carriage. To the extent cable operators have not exhausted this one-third capacity, they are enjoying a programming windfall that should be regained at the close of the transition period. If cable operators have exhausted their one-third capacity, then no additional cable programming would be dropped. These are the only two possible sets of circumstances. At any rate, as cable systems convert to digital, their channel capacity will increase immensely, rendering moot any concerns about dropped cable programming or a reduction in the multiplicity of voices.

It is even argued that DTV must carry will exacerbate existing media concentration.²⁴ Nothing could be further from the truth. As easily deduced from their silence in this proceeding, the big four broadcast networks do not intend to rely on mandatory carriage but rather will negotiate retransmission consent to secure carriage of their DTV signals. TCI admits as much.²⁵ Time Warner just announced its agreement for carriage of the full 6 MHz DTV signal of CBS owned and operated stations.²⁶ As ALTV notes, in the absence of must carry rules, it was the independent stations that were denied carriage on cable systems and not the major network

²⁴ BET Comments at 20.

²⁵ TCI Comments at 12.

²⁶ In addition, Time Warner apparently agreed to deliver HDTV broadcast signals in HDTV format and also promised to include in its delivery any ancillary and supplementary signals. *Communications Daily*, Dec. 9, 1998 at 1.

affiliates.²⁷ **Congress adopted the must carry provisions to ensure cable carriage of all local signals — especially those of independent stations and affiliates of emerging networks.** The denial of carriage for these stations now is being replayed on the digital stage. DTV must carry thus *increases* the multiplicity of media voices and stems the tide of any media concentration.

Notwithstanding that DTV must carry would advance the interests Congress and the Supreme Court identified, TCI argues that *Turner II* establishes a higher burden for DTV must carry because the rules would be promulgated by the Commission as opposed to being mandated by Congress.²⁸ Paxson agrees that if the Commission independently were asserting new carriage requirements outside the authority of a Congress which had not “drawn reasonable inferences based on substantial evidence,”²⁹ the Commission would have such a higher burden. However, when Congress unambiguously requires mandatory carriage of broadcast signals, bases it upon a voluminous generated record, and then directs the Commission to ensure immediate DTV must carry, the Commission’s only “burden” is to fulfill Congress’s mandate.

B. Digital Technology Does Not Eliminate the Ability of Cable Operators To Harm Local Television Stations.

²⁷ Comments of the Association of Local Television Stations, Inc. (“ALTV”) at 23 (“ALTV Comments”).

²⁸ TCI Comments at 6-8.

²⁹ *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 666 (1994) (“*Turner I*”).

Congress already has articulated the government's interests relating to the mandatory carriage provisions, and the Commission does not have discretion to contravene Congress's intent. Time Warner contends that not only would DTV must carry not further the government's identified interests, but it would be impossible for the Commission to articulate *any* government interest DTV must carry would serve.³⁰ Time Warner goes on to state that it believes the Commission is compelled to identify with specificity what purposes would be furthered by DTV must carry and that, until then, it is impossible to determine whether DTV must carry rules would be content-based or otherwise subject to strict scrutiny under the First Amendment.³¹

The implicit premise of Time Warner's contentions is that DTV technology is so different and strange, cable operators would lose the ability to exploit their bottleneck control and threaten the economic viability of local broadcasters; and, in fact, DTV is so peculiar, it could somehow transform the must carry provisions into a content-based regulation. **Paxson would like to believe that, simply by introducing a new digital television format, cable operators would lose their gatekeeping control, but there is no evidence indicating the cable operators have any plans to voluntarily carry all local broadcasters' DTV signals — that is, until the time analog transmissions are terminated.** Instead, the cable industry promises in their comments that cable networks will be the vehicle for the DTV transition, while ensuring that broadcasters of

³⁰ Time Warner Comments at 11-14.

³¹ *Id.* at 14.

their choice are anchored to NTSC carriage through at least 2006.³² The government's interest in preventing discriminatory treatment that threatens broadcasters' economic viability is as plain today as it was when Congress attempted to eliminate such harm by adopting the mandatory carriage requirements.

Time Warner's belief that DTV must carry could be a content-based regulation totally is without support but further indicative of the metaphysical capabilities that the cable industry would attribute to DTV. While demanding that the Commission articulate a "coherent" rationale for DTV must carry, Time Warner offers no articulation of its own as to why digital signals would transform a content-neutral regulation into one that is not. In *Turner I*, the Court said that must carry provisions were content-neutral because they distinguished between "the manner in which speakers transmit their messages to viewers, and not upon the messages they carry."³³ DTV is a new technical format only - the way in which the message is transmitted may be different but the message itself remains the same. The DTV format triggers content-based scrutiny no more than the NTSC format. DTV must carry is a ***content-neutral regulation*** that furthers the important interests Congress and the Supreme Court identified.

IV. MUST CARRY RULES DO NOT CONSTITUTE A TAKING OF PROPERTY.

In what can be characterized only as a desperate grasping at straws, the cable industry introduces in this proceeding the contention that the must carry rules constitute a Fifth Amendment taking. This is, however, not a new issue for the Commission or the

³² NCTA Comments at 45; TCI Comments at 20-21; Time Warner Comments at 5-6.

³³ 512 U.S. at 645.

courts. Both have explicitly rejected the argument that mandatory carriage of television signals somehow results in an unconstitutional taking. Because there is no physical invasion of cable "property", and because of the cable industry's expectation of regulation, the takings argument is wholly meritless.

At the time of the emergence of cable television, the Eighth Circuit held in *Black Hills Video v. FCC* that regulations requiring, *inter alia*, cable systems to carry the programs of local broadcast stations upon request did not violate the Constitution: "The answer to the contention that the regulations adopted constitute a taking of petitioners' property without compensation, in violation of the Fifth Amendment, is that CATVs are under the Communications Act subject to reasonable regulation related to the Act's objectives."³⁴ In reaching its decision, the court looked to the Supreme Court's language in *Chicago, Burlington & Quincy Ry. v. Illinois*: "If the injury complained of is only incidental to the legitimate exercise of government powers for the public good, then there is no taking of property"³⁵

A federal district court reached a similar conclusion in *Berkshire Cablevision of Rhode Island v. Burke*,³⁶ when considering a closely analogous requirement by the Rhode Island Division of Public Utilities and Carriers that cable systems provide three channels devoted to public, educational and government programming. The court held that no taking occurred because the rules "do not, moreover, deprive cable operators of

³⁴ *Black Hills Video v. FCC*, 399 F.2d 65, 69-70 (8th Cir. 1968).

³⁵ *Chicago, Burlington & Quincy Ry. v. Illinois*, 200 U.S. 561, 594 (1906).

³⁶ 571 F.Supp. 976 (D.R.I. 1983) (*vacated as moot*, 773 F.2d 332 (1st Cir. 1985)).

all of the use of their property. . . . While the DPUC's regulations impose an economic burden on cable operators, there is simply no evidence that they prevent cable operators from making a profit or obtaining a reasonable return on investment."³⁷

When considering its 1986 must carry rules, the Commission itself also concluded that must carry does not constitute an unconstitutional taking.³⁸ The Commission noted that the Supreme Court decision's in *Penn Central Transportation Co. v. New York City*³⁹ "concludes that regulation of use of private property which impairs its value is not a taking if it serves a substantial public purpose and does not prevent a reasonable use of the property."⁴⁰

In its comments, the NCTA relies on *Loretto v. Teleprompter Manhattan CATV Corp.*⁴¹ and *Bell Atlantic Corp. v. FCC*⁴² to argue that must carry rules are an unconstitutional taking. These cases, however, involved a "permanent physical occupation"⁴³ which does not arise in the must carry context. Under the must carry

³⁷ *Id.* at 989. There is no plausible Fifth Amendment distinction between existing must carry requirements, existing PEG requirements, and the proposed DTV must carry requirements. An invalidation of one would necessarily undermine the others.

³⁸ Amendment of Part 76 of the Commission's Rules Concerning Carriage of Television Broadcast Signals by Cable Television Systems, *Report and Order*, 1 FCC Rcd 864 (1986) ("*Must Carry Report and Order*") (citing *Trinity Methodist Church South v. Federal Radio Commission*, 62 F.2d 850, 853 (D.C. Cir. 1932)).

³⁹ 438 U.S. 104 (1978).

⁴⁰ *Must Carry Report and Order* at n.180.

⁴¹ 458 U.S. 419 (1982).

⁴² 25 F.3d 1441, 1445 (D.C. Cir. 1996).

⁴³ See Laurence Tribe, *American Constitutional Law* 603 (2d ed., 1988) (noting that the *Loretto* Court's "obsession with permanent physical invasions of even the most de minimis

provisions, there is no physical, tangible object invading the real property of any cable operator. Rather, the rules merely require that electrical impulses originated by broadcasters be delivered to cable subscribers. The Supreme Court previously has noted a distinction between the movement of "physical objects" and "the more intangible movement of electronic impulses" in the telecommunications context.⁴⁴ The Commission has also distinguished "physical" from "electronic," particularly in regard to cable system facilities.⁴⁵

Furthermore, under must carry, cable physical plant remains under an operator's exclusive control and ownership. Cable operators also retain discretion as to *how* the DTV electronic impulses are transported (subject to degradation restrictions). They may choose to manipulate the electronic signal in a number of ways, including through multiplexing or compression techniques. This distinction is significant. Lack of ownership and control was a dispositive factor in both *Loretto* and *Bell Atlantic*.⁴⁶

variety borders on fetishism"). The majority opinion in *Loretto* uses the term "physical" over 60 times, and states that "[o]ur holding today is very narrow. We affirm the traditional rule that a permanent physical occupation of property is a taking." 458 U.S. at 441.

⁴⁴ *Goldberg v. Sweet*, 488 U.S. 252, 264 (1988) (upholding an Illinois gross receipts tax on telecommunication services).

⁴⁵ See, e.g., Implementation of Section 304 of the Telecommunications Act of 1996, *Report and Order*, 13 FCC Rcd 14775, at ¶38 (rel. June 24, 1998); Telecommunications Services Inside Wiring, *Report and Order*, 13 FCC Rcd 4826, at ¶ 216 (1997) ("*Inside Wiring Order*") (discussing rules that would protect cable systems from either physical or electronic harm).

⁴⁶ While the *Bell Atlantic* court overturned the FCC's physical co-location rules, it found no fault with the virtual co-location rules, explaining that "[t]he difference between the two schemes is a difference in ownership and right of occupancy; under virtual co-location the LEC owns and operates the circuit terminating equipment, whereas under physical co-location the CAP owns the equipment and enjoys a right to occupy a portion of the LEC office"

See also, *Tribe* at 603 ("This distinction is of critical importance to the [*Loretto*] majority because ownership would permit the landlord, not the CATV company, to decide how . . . to

Without a permanent invasion by a physical object owned by another party, there is no *per se* taking. Accordingly, under the Supreme Court's *Penn Central* analysis, other factors must be considered to determine if a regulatory taking has occurred.⁴⁷ As previously interpreted by the Commission, these additional factors are (1) the economic impact of the regulation and (2) the regulation's interference with investment-backed expectations.⁴⁸

The economic impact of must carry rules is limited by statute because the maximum number of channels required to be carried is one-third of a system's capacity. The Supreme Court in *Turner II* determined under intermediate scrutiny that the one-third limit was permissible. Furthermore, local broadcast stations attract higher ratings than do cable networks providing tremendous economic benefit to multi-channel providers.⁴⁹

Cable operators have no reasonable investment-backed expectation that the regulatory environment will remain constant. They voluntarily operate in what they know to be a highly regulated industry. Cable operators agree to comply with applicable regulations as a condition to receiving their government-granted franchise to operate.

control the aesthetic impact of the installation").

⁴⁷ 438 U.S. at 124. Tribe interprets *Penn Central* as suggesting that no taking will be found if a regulation "(1) advances some public interest, but also (2) falls short of destroying any classically recognized element of the bundle of property rights, (3) leaves much of the commercial value of the property untouched, and (4) includes at least some reciprocity of benefit" Tribe at 597.

⁴⁸ See *Inside Wiring Order* at ¶ 227. See also, *Penn. Coal Co. v. Mahon*, 260 U.S. 393 (1922) (holding that a regulation's impact on investment-backed expectations is to be considered in takings cases).

⁴⁹ ALTV Comments at 53-54.

Since 1968, the Supreme Court has made it clear that cable operators are subject to FCC regulation, particularly as it relates to the Commission's regulation of broadcast television.⁵⁰ Four years later, the Court, referring to the cable industry, noted that the "property of regulated industries is held subject to such limitations as may reasonably be imposed upon it in the public interest and the courts have frequently recognized that new rules may abolish or modify pre-existing interests."⁵¹ The Court specifically has applied this same reasoning to reject takings claims brought by entities in other highly regulated fields.⁵²

Consistent with this line of Supreme Court cases, the Commission has stated that "[e]nforceable rights sufficient to support a [Fifth Amendment] due process claim cannot arise in an area voluntarily entered into and one which, from the start, is subject

⁵⁰ *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968) (holding that the FCC has jurisdiction at least to the extent "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting").

⁵¹ *United States v. Midwest Video Corp.*, 406 U.S. 649, 674 n. 31 (1972) (quoting *General Telephone Co. of Southwest v. United States*, 449 F.2d 846, 863-64 (5th Cir. 1971)).

⁵² See, e.g., *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1007 (1984) (noting that the area of pesticide use and sales had long been a "source of public concern and the subject of government regulation," the Court held that required disclosure of proprietary information as part of the product registration process did not constitute a taking because there was no reasonable, investment-backed expectation that the information would remain inviolate in the EPA's hands); *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 223 (1986) (holding that no takings occurred when a new federal law saddled certain employers with additional liabilities that had not been established in their original pension plan trust agreements because employers should have been aware that the Federal government regulates pension plans and such regulations are subject to changes); *FHA v. The Darlington, Inc.*, 358 U.S. 84, 91 (1958) ("Those who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end."); *Mitchell Arms, Inc. v. United States*, 7 F.3d 212, 216 (Fed. Cir. 1993), cert. denied, 114 S.Ct. 2100 (1994) (party who had voluntarily entered the firearms import business placed himself in a heavily regulated arena, and any expectation flowing from permit "could not be said to be a property right protected under the Fifth Amendment").

to such pervasive government control."⁵³ Last year, when rejecting a takings claim against its inside wiring rules, the Commission reminded the cable industry that it operates in an environment highly susceptible to regulatory changes and thus faces a higher burden in showing that its investment-backed expectations will be harmed:

Given that the cable industry and cable wiring are subject to significant regulation under Title VI of the Communications Act, the expectations of entities in the cable industry must be based on those regulations, the premise of the law underlying them, and that regulations are amended to respond to changing circumstances. This environment is consistent with the Commission's authority to evaluate changing circumstances and amend its policies as it determines necessary.⁵⁴

Thus, previous judicial decisions as well as the Commission's own determinations demonstrate that cable operators have no reasonable investment-backed expectation of pursuing their business without encountering government regulations which may adversely affect their property interests.

Because must carry rules impose no physical invasion and serve the substantial public purpose of preserving the economic viability of free, over-the-air television while still allowing cable operators a reasonable use of their systems, there is no unconstitutional taking.

⁵³ Revision of Rules and Policies for the Direct Broadcast Satellite Service, *Report and Order*, 11 FCC Rcd 9712, at ¶ 139 (1995) (rejecting a takings claim by direct broadcast satellite ("DBS") operators complaining of a change in the FCC's channel assignment rules).

⁵⁴ *Inside Wiring Order* at ¶ 229. The Commission relied upon language in *American Continental v. United States*, 22 Cl. Ct. 692, 697 (1991): "When investment is made in a highly regulated industry, to be reasonable, expectations must be based not only on then-existing federal regulations but also on the recognition that there may well be related changes in the regulations in the future."

NCTA argues that even if the Commission cannot conclude that a takings has occurred, the agency nevertheless must deviate from congressional directive because a questionable constitutional issue trumps a twice-scrutinized federal statute.⁵⁵ NCTA correctly states that the Commission must construe its statutory charge narrowly to avoid serious constitutional questions. However, this principle of construction does not allow the Commission to interpret a statute in a way “plainly contrary to the intent of Congress.”⁵⁶ As with many of the other cable industry comments, NCTA is painting DTV as a peculiar new technology so different and unpredictable, Congress surely could not have meant that the Commission must “ensure cable carriage of [DTV] broadcast signals of local commercial television stations.” Paxson urges the Commission to reject this regulatory opportunism and remain true to the plain language Congress accorded.

V. CONGRESS ACCOUNTED FOR THE BURDEN ON CABLE OPERATORS.

To survive judicial review, the mandatory carriage provisions must not burden substantially more speech than necessary.⁵⁷ Congress carefully determined that the burden of mandatory carriage for cable operators be no greater than one-third of a system’s capacity.⁵⁸ The Supreme Court, having the opportunity twice to consider the constitutionality of the burden, found that the one-third capacity limit was appropriate.

⁵⁵ NCTA Comments at 20.

⁵⁶ *DeBartolo Corp. v. Florida Gulf Coast Trades Council*, 485 US 568, 575 (1988).

⁵⁷ *U.S. v. O’Brien*, 391 U.S. 367 (1968).

⁵⁸ 47 U.S.C. § 534(b)(1)(B).

The cable industry believes, however, that digital technology somehow transforms the one-third limit into too heavy a burden. NCTA and Time Warner contend that this burden is too high for those cable operators who might lose their windfall excess capacity and thus face dropping cable programming (of the operator's choice) if capacity is not expanded.⁵⁹ C-SPAN maintains that the mere existence of alternatives to must carry renders the provisions too burdensome unless and until those alternatives are found to be insufficient.⁶⁰

Fortunately, the Commission already has announced that it will not deviate from Congress's clear directive on the one-third capacity limit.⁶¹ **Cable operators are not required to devote more than one-third of their existing capacity for mandatory carriage purposes, and because Congress did not distinguish or exclude digital signals from mandatory carriage, it did not exclude those signals from being attributed to the one-third capacity limit.** The dropped programming that cable operators claim is a burden is nothing more than the temporary loss of a windfall. Cable operators will recover those channels no later than when the Commission recovers the analog spectrum. Furthermore, given the advantages of digital technology, cable operators can expand capacity and recover their "lost" programming well before then. C-SPAN's assertions, just as those of NCTA and Time Warner, are arguments that the Supreme Court flatly repudiated in *Turner*. As the Supreme Court stated in rejecting a

⁵⁹ NCTA Comments at 30-32; Time Warner Comments at 23-24.

⁶⁰ Comments of C-SPAN Networks ("C-SPAN") at 13.

⁶¹ *Notice* at ¶51.

slew of alternatives to must-carry, "Our precedents establish that when evaluating a content-neutral regulation which incidentally burdens speech, we will not invalidate the preferred remedial scheme because some alternative solution is marginally less intrusive."⁶² The Commission need not expend its resources entertaining arguments clearly and flatly rejected by the Supreme Court. Congress limited the must carry burden to one-third of the cable operator's capacity. The Commission may not deviate from this plain language simply because of the technical implementation of DTV.

CONCLUSION

The cable industry seeks to obstruct the implementation of digital television by refusing to carry the digital signals of local broadcasters until the end of the digital "transition." As dictated by the cable industry's bottleneck power, there would be no transition to digital television at all. Instead, the two-thirds of American households receiving signals through cable would view the digital signals of all local broadcasters no earlier than when analog spectrum is returned to the Commission, currently scheduled for 2006 — and, perhaps, even later. Obviously, under these circumstances, consumers will have little incentive to purchase digital receivers, thus likely extending the digital "transition" long beyond that contemplated by the Commission.

Congress, however, has precluded this scenario. Congress plainly stated that the Commission was to ensure digital must carry at the time local broadcasters

⁶² *Turner II*, 117 S.Ct. at 1200.

commence DTV operations. Congress did not exclude digital signals from the mandatory carriage rules. The Supreme Court, after twice reviewing the merits, determined that Congress properly restrained the discriminatory harm that the cable industry could and did inflict upon local broadcast stations. While the cable industry ascribes transformative powers to digital television in an attempt to distinguish digital and analog formats, Congress and the Supreme Court recognized that although technologies may change, guiding principles do not. The Commission has no authority to deviate from the must carry mandate Congress decreed.

Technology enables change, but it does not create change. The implementation of digital television does not eliminate the ability of cable operators to discriminate against local broadcasters and to threaten their viability. Paxson urges the Commission to act decisively in following Congress's directive to ensure digital must carry. Only in an atmosphere of such regulatory certainty can broadcasters, manufacturers, consumers, and the cable industry successfully transition to the digital world.

Respectfully submitted,

PAXSON COMMUNICATIONS CORPORATION

By: 

Name: William L. Watson

Title: Vice President and
Assistant Secretary

PAXSON COMMUNICATIONS CORPORATION
601 Clearwater Park Road
West Palm Beach, FL 33401
561/659-4122

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